NO. 92-74

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, in his Capacity as Director of the Department of Revenue of the State of Oregon,
Petitioner,

V.

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION; PULLMAN LEASING COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, FLORIDA, IDAHO, INDIANA, IOWA, MONTANA, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, VIRGINIA, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Whether a state imposes a discriminatory tax on railroad property, in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the state's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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INTEREST OF THE AMICI

Washington and the other named States submit this brief as *amici curiae* in support of the petitioner, Oregon, and urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment of that court in this matter, *ACF Indus., Inc. v. Department of Rev.*, 961 F.2d 813 (9th Cir. 1992) (*"ACF Oregon"*). Since this brief is submitted on behalf of Washington, Arizona, California, Florida, Idaho, Indiana, Iowa, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Virginia, Wisconsin, and Wyoming by their attorneys general, consent to its filing is not required. SUP. CT. R. 37.5.

The principal issue presented here is whether a state imposes a discriminatory tax upon railroad property in violation of the Railroad Reorganization and Regulatory Reform Act of 1976 (the "4R Act") when the state's laws exempt from property taxes any class of property of a type not owned by a railroad.

The amici States are fifteen States within whose borders railroads and carlines carry on extensive transportation operations. The property tax systems of all these States closely parallel Oregon's by granting property tax exemptions, some enjoyed by both railroads and non-railroad businesses and others enjoyed only by non-railroad businesses because of the kinds of property railroads own.[1] All of these amici States potentially will confront the same Hobson's choice that Oregon now faces: either to confine exemptions to the types of property actually owned by railroads, or to forego collection of property taxes from railroads altogether.[2] Six of these States (Arizona, California, Idaho, Mon-

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[1]The relevant provisions of these States' laws are in Appendix A, *infra*.

[2]*See* Pet. at 26-27. The potential property tax loss to amici States and other fiscal consequences are summarized, *infra*, at 18-19.

tana, Nevada, and Washington) are within the Ninth Circuit and are affected immediately by the decision below.[3] The others, Florida, Indiana, Iowa, Nebraska, North Carolina, Oklahoma, Virginia, Wisconsin, and Wyoming, join in this brief as nonmembers of the Multistate Tax Commission, which is filing a brief as *amicus curiae* on behalf of its thirty-three member States in support of Oregon's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

1. Under the decision below, a state property tax system that exempts any class of property not owned by a railroad without exempting all property owned by that railroad is "discriminatory." The Ninth Circuit's remedy for this "discrimination" is to enjoin collection of any taxes on the railroad's property. Thus, under the Ninth Circuit's interpretation of the 4R Act, a particular railroad's entitlement to property tax immunity turns on whether that railroad owns any property in each class of exempt property. Under this test of discrimination, a State could violate the Act even if a railroad had a greater percentage of exempt property than other commercial and industrial taxpayers. Such a test of discrimination turns the Act on its head. The Ninth Circuit's novel interpretation of the Act leads not only to bizarre results in this case and in other cases to follow in its wake, but also ignores the plain meaning and history of the Act, disregards accepted notions of tax discrimination developed by this Court and other courts, and gravely impairs a State's ability to make sound tax policy judgments without suffering substantial revenue losses.

2. The Ninth Circuit erroneously decides every major issue in this case, in conflict with decisions of many other lower courts. First, 49 U.S.C. § 11503(b)(4) plainly does not apply to property taxes, which are governed instead by the

[3]The two other States within the Ninth Circuit, Alaska and Hawaii, have no similar railroad activities within their borders.

specific restrictions in subsections (b)(1)-(3). Second, even if Congress somehow intended subsection (b)(4) to apply to property taxes, despite the plain language of the Act, Congress could not have intended courts to scrutinize property tax exemptions under the general terms of subsection (b)(4), so as to render superfluous most of the remainder of § 11503. Third, taxes that are governed by subsection (b)(4) violate § 11503 only if they subject railroads as a class to tax burdens not shared by a significant group of local taxpayers. Fourth, Congress intended violations of the Act to be remedied by taxing railroads in the same manner as most other similarly situated taxpayers, not by granting railroads preferential tax treatment.

3. This case presents important issues of federal law upon which lower courts are divided. The impact of the Ninth Circuit's decision will extend well beyond the personal property taxes Oregon is enjoined from collecting. Few, if any, current state tax systems of any kind could survive scrutiny under the Ninth Circuit's novel interpretation of § 11503. The resulting revenue losses in the Ninth Circuit States alone will be substantial.

ARGUMENT

I. The Ninth Circuit's interpretation of the statute is unworkable and will lead inevitably to bizarre results that Congress could not have intended.

As we discuss in Section II, *infra*, the Ninth Circuit's decision contains several distinct legal errors. The inconsistent and even irrational results the decision may produce, however, graphically highlight its wrong-headed nature. In testing for discrimination under subsection (b)(4), the court formulates a rule that "any exemption not also available to

railroads" violates the statute. Pet. App-17.[4] In applying that rule, however, the court holds that an exemption is "available" if, and only if, the particular railroad invoking subsection (b)(4) in fact owns property of the class or type that qualifies for the exemption.[5] For example, if the railroad owns a motor vehicle, then a motor vehicle exemption is "available" to it; otherwise it is not.

The consequences of applying this test are magnified beyond the result reached below, since the Ninth Circuit recognizes that its holding cannot be confined to property taxes. *See* Pet. App-13. Thus, sales tax, gross receipts tax, and net income tax systems, which typically contain exemptions, credits, and deductions, all are subject to challenge under this "availability" test for discrimination.

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[4]The court states that its holding is subject to a "possible qualification" that a *de minimis* level of exemption available only to other taxpayers might not state a claim under § 11503(b)(4). The court expressly declines to decide whether such a *de minimis* limitation to its holding should be implied, however, because the level of exemption for non-railroad property in Oregon—approximately 25% according to the court's calculation—is "far from *de minimis*." Pet. App-17-18. By analogizing to § 11503(c)'s 5% threshold for relief from property tax assessment discrimination when explaining the possible *de minimis* limitation, the court suggests that the aggregate level of exemption would have to be a very small fraction of the total tax base to qualify as *de minimis*. *See* Pet. App-17; *cf. Wisconsin Dep't of Rev. v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447 (1992) (*de minimis* exception implied in most statutes excuses only trivial deviations from prescribed statutory standards).

[5]Lest there be any doubt that the court below adopts this test, consider the following. The court states that in Oregon 25% of non-railroad property enjoys exemptions "not available to railroads" (business inventories, farm machinery and equipment, and motor vehicles), concluding that this level of exemption "available only to other taxpayers" is "far from *de minimis*." Pet. App-17-19. Oregon's exemptions for business inventories, farm machinery and equipment, and motor vehicles are facially neutral. *See id.* at App-11. Thus, these exemptions are "unavailable" to the plaintiff carlines solely because they do not own property of the types qualifying for the exemptions. *See id.* at App-18-19.

A. Under the Ninth Circuit's test of discrimination, a state tax system that treats railroads more favorably than any other taxpayer group could be held to discriminate against railroads.

The Ninth Circuit's interpretation of § 11503 leads to results that Congress could not have intended. For example, assume that a hypothetical state taxes all commercial and industrial property except business inventories, motor vehicles, and railroad cars. Also assume that business inventories and motor vehicles account for 12% and 3% respectively of non-railroad commercial and industrial property in this state; thus, 85% of non-railroad commercial and industrial property is taxed. A railroad (owning railroad cars and motor vehicles accounting for 55% and 5% respectively of its property in the state) sues the state under subsection (b)(4), claiming that the business inventory exemption discriminates against it because it owns no business inventories. Under the Ninth Circuit's holding in *ACF Oregon*, even though the state taxes only 40% of the railroad's property versus 85% of all other commercial and industrial property, the state is enjoined from taxing any of the railroad's property. While this may be an unusual hypothetical, it illustrates the kind of bizarre results that the Ninth Circuit's "availability" test inevitably will produce.

B. Under the Ninth Circuit's test of discrimination, the same state tax system could be held illegal as to some railroads and legal as to other railroads.

The Ninth Circuit's "availability" test leads to even more absurd results because it distinguishes irrationally between railroads that have essentially identical operations and asset structures, but only incidental differences in what property they own.

For example, assume that a hypothetical state taxes all commercial and industrial property except business inven-

tories and motor vehicles. Railroad A may own a few motor vehicles and may hold small amounts of business inventories because of a particular feature of its business operations. Railroad B may own a similar number of motor vehicles but no business inventories. Railroad A has "availed" itself of both exemptions, while Railroad B has "availed" itself of only the motor vehicle exemption. Under the Ninth Circuit's interpretation of § 11503, substantially all of Railroad A's property will remain taxable; equivalent property of Railroad B will be immune because of the "unavailability" of the business inventory exemption.[6]

These perverse results would have been avoided if the court below had been faithful to recognized principles of effectuating Congressional intent—principles that other lower courts have correctly applied in 4R Act cases.

II. The Ninth Circuit's decision directly conflicts with better reasoned decisions of federal courts of appeal and of state supreme courts.

A. The Ninth Circuit's interpretation of the unambiguous "any other tax" language of subsection (b)(4) to include property taxes addressed in subsections (b)(1)-(3) ignores the plain meaning of subsection (b)(4).

[6]It should be no answer to argue that Railroad A's competitive disadvantage, flowing as it does from an incidental difference in property ownership, can be alleviated through a reorganization of the railroad's corporate structure or an outright divestiture of the tax-exempt property. Absent some clear legislative expression, courts should not fashion a rule promoting financial restructuring that is without economic substance except for tax purposes.

In *ACF Oregon*, the Ninth Circuit broadly interprets the "any other tax" language of subsection (b)(4)[7] to apply to property tax exemptions, supposedly to effectuate "Congress' purpose" in enacting § 11503. *See* Pet. App-9-13. In all statutory construction cases, however, the "starting point must be the language employed by Congress," and a court must assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). An earlier Ninth Circuit decision adhered to this precept by pointed reliance on this Court's admonition in *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987), that the plain language of § 11503 controls "in the absence of a clearly expressed legislative intent to the contrary." *See Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).[8]

[7]Section 11503(b)(4) prohibits the imposition of "another tax that discriminates against a rail carrier[.]" Section 306(1)(d) prohibited the imposition of "any other tax which results in discriminatory treatment of a common carrier by railroad[.]" The recodification of § 306 was not meant to change its substantive provisions. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). *But see ACF Oregon*, Pet. App-2. To avoid confusion, we will consistently use the original language from § 306(1)(d) in discussing § 11503(b)(4).

[8]The railroad in *Blackfeet Tribe* contended that the intent of Congress could not be achieved unless the 4R Act were interpreted to divest Indian tribes of authority to tax on-reservation rights of way, thus limiting the powers of tribes as well as states. *Id.* at 905. Unlike the court below, the *Blackfeet Tribe* panel declined to read into the Act provisions that might better effectuate a perceived statutory policy, particularly where recognized rights (tribal taxing authority) would be abrogated. *Cf. Atchison, Topeka & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442, 1443 (9th Cir. 1986)("Congress passed the 4-R Act to provide railroads with *some* protection from the common state practice of discriminatorily taxing rail transportation property."(emphasis added), *vacated on other grounds*, 828 F.2d 9 (9th Cir. 1987). The parallel between the tribal interests at stake in *Blackfeet Tribe* and the state interests at stake here is abundantly clear.

The Ninth Circuit's construction of subsection (b)(4) in *ACF Oregon* is flatly contradicted by the relevant statutory language. Following in sequence subsections (b)(1)-(3), which proscribe discriminatory property taxes, subsection (b)(4) prohibits the imposition of "any other tax" that "results in discriminatory treatment of a common carrier by railroad[.]" In the context of § 11503(b) as a whole, "other" in subsection (b)(4) obviously means different or distinct. Thus, Congress plainly expressed its intent to forbid discriminatory taxes different or distinct from those it had already specified—*i.e.*, property taxes. This literal reading of subsection (b)(4) is consistent with this Court's direction that the language of § 11503 must "be regarded as conclusive" where the terms of the statute are unambiguous. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

In contrast to the approach of the Ninth Circuit, the Virginia Supreme Court gave effect to the plain language of §11503, holding that property taxes fall outside the scope of subsection (b)(4):

> Arlington County has clearly not imposed "another tax" which discriminates against railroads so as to violate subparagraph 4. The only tax challenged here is the *ad valorem* real property tax regulated by the first three subparagraphs and imposed in full compliance with those provisions. We agree with the [State Corporation Commission] that *the fourth subparagraph does not refer to ad valorem property taxes at all*, but rather refers to other or different schemes of taxation not contemplated by the first three subparagraphs.

Richmond, Fredericksburg & Potomac R.R. v. State Corp. Comm'n, 230 Va. 260, 336 S.E.2d 896, 897 (1985) (emphasis added).[9]

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[9] In *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, No. 3-91-0066 (M.D. Tenn. July 20, 1992), a federal district court also has held that subsection (b)(4) applies only to taxes other than property taxes.

In *Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991), a case involving an occupational tax, the Seventh Circuit similarly concluded that subsection (b)(4) does not apply to property taxes:

> The federal statute is aimed primarily at property taxes and as to them [in subsections (b)(1)-(3)] it sets forth clear standards designed to prevent the placing of an excess burden on railroads. Subsection (b)(4) is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax. It could be an income tax, a gross-receipts tax, a use tax, an occupation tax as in this case—whatever.

Id. at 1186.

The Ninth Circuit's decision in *ACF Oregon* directly conflicts with the Virginia Supreme Court's decision on the same federal question and is contrary to the Seventh Circuit's interpretation. In light of these conflicting interpretations as to the scope of subsection (b)(4), the Court should issue the writ to resolve this question definitively.

B. By interpreting subsection (b)(4) to forbid any tax exemption not also "available" to a railroad, the Ninth Circuit embraces a "discrimination" test at odds with the political check principle usually applied in this and analogous contexts.

The meaning of the phrase "any other tax" is not the only question on which there is conflict and confusion in the lower courts. Even more troublesome—in part because it affects all taxes this Court might conclude are governed by subsection (b)(4)—is the question of what constitutes "discrimination" under that provision.

First, a word about the source of the trouble. In contrast to the carefully drawn tests for discrimination in subsections (b)(1)-(3), no test is contained in subsection (b)(4). The subsection merely prohibits "any other tax" that "discriminates" against railroads. To give meaning to subsec-

tion (b)(4), some borrowing obviously is necessary. The important question is: From where?

Once the court below decides that the phrase "any other tax" includes property taxes, it logically should borrow from one of two possible sources: (a) § 11503 itself or, more precisely, the tests embodied in subsections (b)(1)-(3); or (b) the "political check" principle, to be discussed shortly. Borrowing from either source would produce the same result—Oregon's tax would be upheld.

The Ninth Circuit does neither. In effect, the court creates a comparison class to test for discrimination by enlarging the statutory definition of "commercial and industrial property" in subsection (a)(4) by adding back some, but not all, property specifically excluded from the definition. The court gives no reason for omitting from the comparison class still other kinds of excluded property (*e.g.*, agricultural land, charitable personal property, household goods and effects). In the process, the court ignores a crucial element in the statutory definition—the exclusion of property not subject to a property tax levy.[10] This approach to statutory construction, we submit, is judicial license run amuck.

Other circuits, at least in the non-property tax context, have used a more rational approach than the Ninth Circuit; they have borrowed and applied the "political check" principle in subsection (b)(4) cases. For examples, see *Kansas City Southern Ry. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987), and *Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991).[11]

[10]The definition of "commercial and industrial property" includes all "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." The Ninth Circuit apparently feels free, in a subsection (b)(4) case, to reach into this definition and to apply any elements it chooses, while disregarding the others, all in the name of effectuating congressional intent.

The political check principle originally was developed as a test to determine whether a state or local tax system discriminates against the federal government or those dealing with the federal government. Although the principle has its roots in *M'Culloch v. Maryland*, 4 Wheat 316 (1819), its more recent development is in *Washington v. United States*, 460 U.S. 536, 545 (1983), and *United States v. County of Fresno*, 429 U.S. 452, 462-63 (1977). As stated in *Washington v. United States*:

> A "political check" is provided when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government.

460 U.S. at 545.[12]

[11]The carlines apparently agree with our characterization of these cases. In a brief in opposition submitted to this Court in another 4R Act case, Trailer Train Company, Railbox Company, and Railgon Company, three of the same plaintiff carlines who initiated the instant case, stated:

> Every decision by a United States Court of Appeals interpreting [subsection (b)(4)] has made clear that any tax that is imposed generally on other commercial and industrial taxpayers may also be imposed on railroads and railcar companies. *See, e.g., Burlington Northern R.R. Co. v. City of Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991) (state is confined to taxing railroads as members of larger taxpayer groups such as owners of commercial and industrial property or recipients of gross receipts or net income); *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987) ("We think the best course is to require that the railroads be taxed only under taxes applicable to 'other commercial and industrial taxpayers'").

Br. of Resp'ts in Opp'n to Pet. for Writ of Cert. at 3-4, *State Tax Comm'n v. Trailer Train Co.* (No. 91-20).

[12]This Court uses a similar analysis in determining whether a state tax violates the Free Press Clause of the First Amendment. *See Leathers v. Medlock*, 111 S. Ct. 1438 (1991).

The anomaly of adopting an "availability" rather than a "political check" test should now be apparent. The Ninth Circuit deems Congress to have provided railroads with protection from state taxation far broader than that developed by this Court for the federal government itself.[13] Moreover, in the Ninth Circuit at least, this is so whether the tax involved is a property tax, a gross receipts tax, a sales tax, or any other kind of tax. The Fifth and Seventh Circuits, however, presumably will continue to apply the political check principle, just as they did in *McNamara* and *City of Superior*.[14] As to which test other circuits will apply in the future

[13]We do not suggest, of course, that Congress lacks the power to produce such an anomalous result, but that such a result should rest on a much firmer basis than the language of subsection (b)(4). We also recognize that the political check principle will not validate a state tax system that treats the state itself (or those dealing with it) more favorably that it treats the federal government (or those dealing with it). *Cf. Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

[14]The anomaly becomes greater if one compares the decision below with the Ninth Circuit's own earlier decision in *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983). There, two of the same carlines as in *ACF Oregon* claimed that California violated subsection (b)(3) by attempting to tax their railroad cars at a tax rate higher than the two tax rates imposed on most other commercial and industrial property. The Ninth Circuit held that the tax rate applicable to the majority of commercial and industrial property would be the rate to be applied to the carlines. 697 F.2d at 867.

> In so holding, the court discussed the overall purpose of § 11503:
>
> [T]he use of the rate applicable to the majority of the commercial and industrial property adequately satisfies the basic purpose of § 11503, which is 'to prevent states from discriminatory taxation of rail-transportation property. As long as the majority of commercial and industrial property is taxed at the same rate as rail-transportation property, the owners of such commercial and industrial property can be expected to provide a strong check against any state discrimination.

Id. at 867 n.11.

We agree. Yet in its discrimination analysis in *ACF Oregon*, the Ninth Circuit abandons this approach for no apparent reason, without even discussing this critical aspect of *Trailer Train*.

cases that inevitably will be brought under subsection (b)(4), one can only guess.

C. By granting railroads a preferred tax-exempt status as the remedy for discrimination, the Ninth Circuit ignores Congress' recognized intent to relieve railroads only from unfair tax burdens.

The Ninth Circuit's arbitrary application of § 11503 carries over to the remedy issue. The plaintiff carlines now are fully exempt from Oregon property taxes. But why?

As Oregon points out in its petition, in fashioning relief under subsections (b)(1) through (b)(3), the lower courts uniformly have concluded that railroads may be relieved only of taxes that exceed the average tax imposed in a jurisdiction. *See* Pet. at 24. This remedy implements a congressional policy reflected in these very subsections.[15] Simply stated, this policy is: no tax discrimination against railroads—but no tax preferences for them either. Yet the Ninth Circuit now concludes that Congress, in enacting subsection (b)(4), changed its mind and abandoned this policy.

The language Congress used in the original version of the 4R Act shows that Congress did not abandon the policy. Section 306(2) is the jurisdictional provision of the Act. It carves out an exception to 28 U.S.C. § 1341, the Tax Injunction Act, by conferring on federal courts jurisdiction to grant such injunctive and other relief "as may be *necessary* to prevent, restrain or terminate any acts in violation of this section." Section 306(2)(emphasis added)(reproduced at Pet. App-39-40). The Ninth Circuit's grant of tax preferences to

[15]With respect to subsections (b)(1) and (b)(2), this policy is most clearly reflected in the phrase "(but only to the extent of any portion based on excessive values as hereinafter described)," which appears in the original version of subsection (b)(1). Similarly, the original version of subsection (b)(3) prohibits only the application of "a tax rate higher than the tax rate generally applicable to commercial and industrial property." *See* §306(1)(reproduced at Pet. App-39).

the carlines can hardly be characterized as "necessary" to eliminate discrimination against interstate commerce. In this vein, one other circuit court has rejected the claim that a finding of discrimination under § 11503(b)(4) warrants total immunity from the tax in issue as opposed to a form of relief that eliminates the incremental portion of the discriminatory tax. *Burlington Northern R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985).[16]

III. The Ninth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court.

A. This case presents an issue similar to one to which this Court previously gave plenary consideration on appeal but did not decide.

In *Western Air Lines, Inc. v. Hughes County*, 372 N.W.2d 106 (1985), the South Dakota Supreme Court rejected four airlines' claims that a South Dakota property tax violated the Airport and Airway Improvement Act of 1982, 49 U.S.C. App § 1513(d), a statute modeled on the 4R Act. South Dakota taxed the airlines' personal property while exempting most other personal property. As in the 4R Act, assessment ratios or tax rates applied to airline property are tested for discrimination under § 1513(d) by comparing them to the ratios or rates applied to other "commercial and industrial property," which is defined identically in both

[16]No persuasive basis exists for reconciling the holding in *Bair* with the result the Eighth Circuit later reached in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied sub nom. Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989), which granted carlines full exemptions from personal property taxes upon finding that Nebraska's law exempted an aggregate 75% of personal property owned by other businesses. Even assuming the *Leuenberger* court might have conferred an equivalent remedy in a situation comparable to Oregon's, the conflicts between *Bair* and *ACF Oregon* and between *Bair* and *Leuenberger* are representative of the confusion that exists in the lower courts over these recurring issues.

Acts. *Compare* § 1513(d)(2)(D) *with* § 11503(a)(4). The State Supreme Court rejected the airlines' discrimination claims because they were based on a comparison between taxed airline property and exempt property not "subject to a property tax levy." 372 N.W.2d at 110.

The airlines appealed, challenging the State Supreme Court's interpretation of "commercial and industrial property" under § 1513(d)[17]. This Court noted probable jurisdiction[18] but affirmed on alternative grounds, without reaching the question of the interpretation of "commercial and industrial property" under § 1513(d). *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 129 (1987). Thus, the conflict in the lower courts over the meaning and effect of this definition has yet to be resolved.[19]

[17]In their jurisdictional statement, the airlines asserted that resolution of the issue would affect the property taxation of 92 commercial airlines, 397 railroads, and 34,000 motor carriers, collectively owning more than $76 billion in property. Juris. Statement at 6, 11-12, *Western Air Lines* (No. 85-732).

[18]After this Court noted probable jurisdiction, the Railway Progress Institute and the Association of American Railroads filed a brief on the merits supporting the airlines, in which they agreed that the case raised "an important issue of statutory construction." Br. Amici Curiae Railway Progress Institute & Association of American Railroads at 1, *Western Air Lines* (No. 85-732).

[19]As Oregon correctly states, the lower courts uniformly have concluded that the definition of "commercial and industrial property" in § 11503(a)(4) means that railroads cannot base a claim of assessment or rate discrimination under § 11503(b)(1) or (3) on a comparison class that includes exempt property. *See* Pet. at 10. The North Dakota Supreme Court, however, has concluded that virtually identical provisions in 49 U.S.C. App § 1513(d) do allow airlines to base a claim of assessment discrimination on a comparison class that includes exempt property. *Northwest Airlines, Inc. v. State Bd. of Equalization*, 358 N.W.2d 515 (N.D. 1984). The North Dakota Supreme Court's interpretation of § 1513(d) directly conflicts with the South Dakota Supreme Court's interpretation of § 1513(d) in *Western Air Lines, Inc. v. Hughes County*, 372 N.W.2d 106 (1985), *aff'd on other grounds sub nom. Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987). This Court initially accepted *Western Air Lines* to resolve that conflict.

The interpretation of the identical definition of "commercial and industrial property" in the 4R Act is a central issue in *ACF Oregon*. As Oregon correctly observes, by enacting this definition Congress could not have intended to allow states to grant property tax exemptions under subsections (b)(1)-(3) while simultaneously intending to invalidate their taxation of railroad property under subsection (b)(4) the moment they do. Pet. at 10-11, 16.[20]

B. The Ninth Circuit's expansive discrimination and remedial holdings cannot logically be limited to property taxes.

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[20]The decision below fundamentally conflicts with *ACF Indus., Inc. v. Arizona*, 714 F.2d 93 (9th Cir. 1983)("*ACF Arizona*"), where virtually the same carlines as in *ACF Oregon* claimed that Arizona violated subsection (b)(1) by exempting business inventories while taxing railroad property in full. In *ACF Arizona*, the Ninth Circuit summarily rejected the carlines' interpretation of the Act:

> The Carlines' first claim is that the state ought to include in its calculation of commercial property all the business inventories in the state (which are categorically exempt from ad valorem taxes) in determine the assessment ratio. This claim has nothing to commend it but a careful lawyer's desire to leave no possible theory unexplored.

Id. at 94.

In *ACF Oregon*, the Ninth Circuit holds that *ACF Arizona* is "simply inapposite," explaining that, unlike subsections (b)(1)-(3), the broad language of subsection (b)(4) is not restricted by the comparison class of "other commercial and industrial property." Pet. App-15-16. In deciding whether Oregon's property tax system discriminates against the carlines under subsection (b)(4), however, the court below compares the tax treatment of the carlines' property with the treatment of *other commercial and industrial property*, without a satisfactory explanation for its refusal to give effect to the statutory definition of "commercial and industrial property" in § 11503(a)(4). Thus, by adopting its novel interpretation of subsection (b)(4), the court below mysteriously transforms an argument that "has nothing to commend it but a careful lawyer's desire to leave no possible theory unexplored" into a juggernaut that will compel states either to alter their tax systems drastically or to abandon taxation of railroads altogether.

If the Ninth Circuit really means what it says in *ACF Oregon*, the implications are likely to reach far beyond the disruption of state property tax systems as described in Oregon's petition. The logical extension of the Ninth Circuit's reasoning means that railroads and carlines should possess absolute immunity from virtually every state or local tax.

If this sounds alarmist, consider the following. First, in *ACF Oregon*, the Ninth Circuit obviously interprets the phrase "any other tax" in subsection (b)(4) to include all types of non-property taxes, *i.e.*, sales taxes, gross receipts taxes, net income taxes, or any others. *See* Pet. App-13. Second, under the "availability" test of discrimination, an exemption is not "available" to a railroad unless the railroad can in fact take advantage of the exemption. Logically, this "availability" test should apply not only to exemptions, but to credits, deductions, or any other form of favorable tax treatment. Just as the type of tax should not matter, the method of conferring the tax benefit or its label should not matter either.[21] Third, once a court finds an offending tax benefit within a tax system, the proper remedy—according to the Ninth Circuit—is to immunize the railroads completely from taxation under that system. *See* Pet. App-19.

The three factors in combination make up the lethal mix for the states.

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[21]For this reason, the Ninth Circuit's discrimination holding in *ACF Oregon* directly conflicts with the Fourth Circuit's decision in *Richmond, Fredericksburg & Potomac R.R. v. Department of Tax'n*, 762 F.2d 375, 380-81 (4th Cir. 1985), holding that Virginia's corporate net income tax did not discriminate against the plaintiff railroad under subsection (b)(4) by denying the railroad an "Extra Depreciation Deduction" extended to many other commercial and industrial taxpayers.

For the same reason, we believe the decision below also directly conflicts with the Sixth Circuit's recent decision in *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548 (6th Cir. 1992), affirming the denial of a preliminary injunction to a railroad claiming that Tennessee violated subsection (b)(4) by exempting business inventories.

C. The likely fiscal impact of the decision of the Ninth Circuit upon the states will be substantial.

The court below immunizes the plaintiff carlines from any taxes upon property they hold. While the carlines sought and obtained relief from personal property taxation only, the railroads, armed with this decision, now contend they are entitled to immunity from all property taxes, real as well as personal.[22]

In effect, the railroads urge that Congress intended to absolve them from any obligation to pay a tax of general applicability that traditionally has been used to fund the essential costs of state and local governments. Nationwide, recent railroad net investment has been estimated to exceed $36.8 billion, with operating revenues calculated at $27.9 billion.[23] Trackage approximates 176,360 miles.[24]

The railroad industry's own recent submission to this Court indicates that taxes paid upon such values by Class I railroads, only, approach $281 million.[25] Since economic incentives such as inventory and agricultural exemptions are widespread, the railroads clearly contend that they should be relieved of a substantial portion of these taxes. The potential consequences from the decision below for Ninth Circuit States are consistent with these nationwide totals. In addition to the possible property tax loss in Oregon, estimated at $9 million, other affected Ninth Circuit States have at risk more than $40 million in property tax revenues. If the rationale of *ACF Oregon* were extended nationwide to immunize railroads from state and local income and sales taxes, the additional potential loss could be estimated conservatively at $100 million.[26]

This sweeping entitlement claim by railroads comes when states are confronting budget crises as acute as any in recent years.[27] *ACF Oregon*'s pending disruption of essential state and local government functions thus could be far-reaching and lingering. However unwarranted and unnecessary such upheaval may be, this situation now confronts the states because of a lower court decision that fundamentally errs in interpreting Congress' intent in addressing these intersecting areas of interest within the federal system.

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[22]*See, e.g., Burlington Northern R.R. v. Department of Rev.*, No. C92-5178WD (W.D. Wash. filed April 30, 1992). *See also Burlington Northern R.R. v. Department of Rev.*, No. 92-585RE (D. Or. filed May 7, 1992); *Portland Terminal R.R. v. Department of Rev.*, No. 92-607FR (D. Or. filed May 13, 1992).

[23]INTERSTATE COMMERCE COMMISSION, 1990 ANNUAL REPORT 115. Totals shown are for Class I line-haul railroads. Under carrier classifications adopted by the ICC, Class I railroads are carriers with annual operating revenues in excess of an amount that is annually adjusted for inflation. In 1989 the revenue threshold was $93.5 million. Class I railroad systems represent three percent of railroads in the country but account for ninety-one percent of freight revenue. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 3 (1990 ed.).

[24]*Id.* at 44.

[25]*See* Br. Amicus Curiae of Association of American Railroads at 14, *Chesapeake W. Ry. v. Tax Comm'r* (No. 91-1198). The jurisdictional statement submitted in *Western Air Lines, Inc. v. Board of Equalization* (No. 85-732) then placed the value of operating property for interstate railroads at more than $43 billion.

[26]ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 16 (1990 ed.). Aggregate taxes paid by railroads in 1989 to state and local governments and to the federal government (other than for federal payroll and income taxes) exceeded $500 million.

[27]Decreasing revenue collections forced thirty-five States to reduce fiscal 1992 budgets as earlier enacted by a total of $5.748 billion. NATIONAL GOVERNORS' ASSOCIATION & NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, FISCAL SURVEY OF THE STATES 5, 11 (1992). Beyond the current economic recession, an increasing national debt and current ceilings on federal domestic spending are cited as sources of continuing pressures on the fiscal health of the states. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE BUDGET AND TAX ACTIONS 39 (1991).

CONCLUSION

For the reasons stated above, this Court should grant Oregon's Petition for Writ of Certiorari.

DATED this 6th day of August, 1992.

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APPENDIX

STATE TAX EXEMPTIONS - SUMMARY[1]

State	Business Inventory	Motor Vehicles	Farm Machinery and Equipment
Arizona	X	X	
California	X	X	
Florida	X	X	
Idaho	X	X	
Indiana		X	
Iowa	X	X	X
Montana	X		X
Nebraska	X		X
Nevada	X	X	
North Carolina	X		
Oklahoma	X	X	
Virginia	X	X	X
Washington	X	X	
Wisconsin	X	X	X
Wyoming	X	X	

[1]Pages 2a-4a of the Appendix contain citations to the specific governing provisions for each State.

STATE TAX EXEMPTIONS - BUSINESS INVENTORIES

Arizona	Ariz. Const. art. IX sec. 2(1)
California	Cal. Rev. Tax Code § 219 (West 1987)
Florida	Fla. Stat. ch.196.185 (1991)
Idaho	Idaho Code § 63-105Y (1989)
Indiana	none
Iowa	Iowa Code Ann. § 427A.10 (West 1990)
Montana	Mont. Code Ann. § 15-6-202 (1991)
Nebraska	Neb. Rev. Stat. § 77-202(7) (Supp. 1991)
Nevada	Nev. Rev. Stat. § 361.068 (1991)
North Carolina	N.C. Gen. Stat. § 105-275(34) (Supp. 1991)
Oklahoma	Okla. Stat. Ann. tit. 68 § 2805(10) (West 1992)
Virginia	Va. Code Ann. § 58.1-3509 (Michie 1991) Va. Const. art. X sec. 4
Washington	Wash. Rev. Code. § 84.36.477 (1989)
Wisconsin	Wis. Stat. Ann. § 70.111(17) (West Supp. 1991)
Wyoming	Wyo. Stat. § 39-1-201(xii) (Supp. 1991)

STATE TAX EXEMPTIONS - MOTOR VEHICLES

Arizona	Ariz. Const. art. IX sec. 11
California	Cal. Rev. & Tax. Code § 10758 (West Supp. 1992)
Florida	Fl. Const. art. VII sec. 1(b)
Idaho	Idaho Code § 63-105P (1989)
Indiana	Ind. Code Ann. § 6-1.1-2-7 (Burns Supp. 1992)
Iowa	Iowa Code Ann. § 321.130 (West Supp. 1992)
Montana	none
Nebraska	none
Nevada	Nev. Rev. Stat. § 361.067 (1991)
North Carolina	none
Oklahoma	Okla. Stat. Ann. tit. 68 § 2805(2) (West 1992)
Virginia	Va. Code Ann. § 58.1-3500 (Michie 1991) Va. Const. art. X sec. 4
Washington	Wash. Rev. Code § 82.44.130 (1989)
Wisconsin	Wis. Stat. Ann. § 70.112(5) (West 1989)
Wyoming	Wyo. Stat. § 39-1-201(xiii) (Supp. 1991)

STATE TAX EXEMPTIONS - FARM MACHINERY AND EQUIPMENT

Arizona	none
California	none
Florida	none
Idaho	none
Indiana	none
Iowa	Iowa Code Ann. § 427A.10 (West 1990)
Montana	Mont. Code Ann. § 15-6-201 (p) (1991)
Nebraska	Neb. Rev. Stat. § 77-202(6) (Supp. 1991)
Nevada	none
North Carolina	none
Oklahoma	none
Virginia	Va. Code Ann. § 58.1-3503(B) (Michie 1991) Va. Const. art. X sec. 4
Washington	none
Wisconsin	Wis. Stat. Ann. § 70.111(10) (West Supp. 1991)
Wyoming	none